



POLICE DEPARTMENT

April 6, 2010

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Michael Farone  
Tax Registry 906205  
Transit District 2  
Disciplinary Case No. 84747/08  
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The above-named member of the Department appeared before me on March 15, 2010, charged with the following:

1. Said Sergeant Michael Farone, while assigned to Transit District 2, as a Patrol Supervision (*sic*) on or about July 1, 2008 and July 2, 2008, did wrongfully and without just cause fail to supervise other members of the service under his supervision, to wit: said Sergeant failed to visit twenty-two members of the service under his supervision on their assigned posts.

P.G. 202-17, PAGE 1 PARAGRAPH 1 PATROL SUPERVISOR  
DUTIES AND RESPONSIBILITIES

2. Said Sergeant Michael Farone, while assigned to Transit District 2, on or about July 1, 2008 and July 2, 2008, while on duty, did wrongfully fail and neglect to maintain his activity log.

P.G. 212-08, PAGES 1-2 – ACTIVITY LOGS, COMMAND OPERATIONS

3. Said Sergeant Michael Farone, while assigned to Transit District 2, on or about July 1, 2008 and July 2, 2008, while on duty, did wrongfully fail and neglect to properly maintain Department records, to wit: said Sergeant failed to sign in and out of the Command Log as required.

P.G. 203-10, PAGE 1 PARAGRAPH 5 GENERAL REGULATIONS

The Department was represented by Rita Bieniewicz, Esq., Department Advocate's Office, and the Respondent was represented by Philip Mellea, Esq.

The Respondent, through his counsel, entered a plea of Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

### DECISION

The Respondent, having pleaded Guilty, is found Guilty as charged.

### SUMMARY OF EVIDENCE IN MITIGATION

The Respondent joined the Department in February 1994 and is currently assigned to Transit District 2. The Respondent became a sergeant in May 2006, and in June of that same year he began working at Transit District 2. The Respondent stated that his responsibilities in this position are to supervise the members of his squad who are working on his tour. The Respondent stated that there are different details that he works at Transit District 2 including patrol supervisor, desk officer, and anti-crime sergeant. Members of the anti-crime detail conduct "bag check" operations. This entails standing in a train station and inspecting the bags of every tenth or fifteenth person to enter the station with a bag.

The Respondent stated that on July 1, 2008 and July 2, 2008, he did bag checks while working his regular midnight tours, which began at 11:05 p.m. the previous night and ended at 8 a.m. On the morning of July 1, 2008, after his regular tour, the Respondent continued working on an overtime from 8 a.m. until 10 a.m. The Respondent

had been assigned to work a tour of overtime later that day, from 1 p.m. until 9:57 p.m. This was ordered overtime from borough.<sup>1</sup> He asked his lieutenant if he could work an additional three hours of overtime (from 10 a.m. to 1 p.m.) to complete some administrative paperwork. He made this request so that he would not have to leave the office only to return three hours later for his 1:00 p.m. overtime shift. The lieutenant, who was the Integrity Control Officer at the time, approved this request.

The Respondent's tour from 1 p.m. until 9:57 p.m., called "Surge" overtime, involved the Respondent and eight officers going from station to station checking to make sure that the train platforms were clear. The Respondent went straight from this tour into his regular midnight tour for the next day, which started at 11:05 p.m. The Respondent then worked beyond his regular tour again, and was on overtime doing bag checks until 10:47 a.m. on July 2, 2008. In total, the Respondent worked approximately 35 hours with only an hour and a half break.

During his original midnight tour on July 1, 2008, the Respondent was the patrol supervisor for eight officers. The Respondent stated that he did "scratch"<sup>2</sup> three of the officers but that he did not scratch the other five because he was in radio contact with them, and he believed that nothing in the Patrol Guide required him to scratch everyone. However, he is now aware that he must scratch everyone. The Respondent stated that he did bag checks from 6 a.m. until 10 a.m.

After this original tour was completed, the Respondent worked overtime and at some point he relieved the desk officer, although he was still on patrol. The Respondent did not make any notations in the command log that he was the desk officer because he

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<sup>1</sup> The transcript reflects the word "bureau" but the Court remembers hearing the Respondent use the word "borough."

<sup>2</sup> To sign an activity log.

was still technically on patrol. At that time, he did not know that he was required to make such a notation. The Respondent stated that he now understands that if he is working on the desk, he is supposed to make a notation of this.

The Respondent testified that during the Surge overtime tour from 1 p.m. until 9:57 p.m., he did not have to scratch any of the eight officers he was working with because they were together the entire time. During the midnight tour on July 2, 2008, the Respondent once again was the patrol supervisor and had eight officers that he was supervising. He did not scratch any of them, although he was in radio contact with them. The officers that he supervised were posted at stations between West 4 Street and 34 Street, which is a maximum of four stations away. The Respondent stated that he is now fully aware of what the Patrol Guide says about scratching the officers that he is supervising.

The Respondent stated that he kept a memo book<sup>3</sup> for the dates in question and that he thought that he was filling it out in accordance with what he was taught at the Police Academy. The memo book entries covering July 1, 2008 and July 2, 2008, were taken into evidence as Court Exhibit 1. After his official Department interview on this matter, the Respondent had a conversation with his Commanding Officer (CO) who told him that the chief's office had said that they were going to give him a Schedule "B" Command Discipline, which carries a maximum penalty of 10 days.

The Respondent stated that he is not contesting that he "messed up" by not signing the books of the officers, but rather that he feels that, "28 days is a little harsh because originally they wanted 10 days." A Department memorandum that was signed by Captain Rosendo P. Velez of the Transit Bureau Investigations Unit requesting a

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<sup>3</sup> Activity log.

Schedule "B" Supervisor's Complaint Report for the Respondent was admitted into evidence as Respondent Exhibit A.

On cross-examination, the Respondent stated that he knows that he had eight officers under his supervision during the midnight shift because that is what the roll call says. The Respondent stated that he did not recall being asked about this during his official Department interview. However, according to a transcript of the official Department interview, the Respondent stated that he had 13 officers under his supervision on one night.

The Respondent stated that the first thing that he did when he came in for his shift on the night of June 30, 2008 was sign the command log. Next, he did a roll call and read off the assignments for the officers under his supervision. He stated that he does not recall their assignments offhand. The Respondent's duty as supervisor was to inspect the officers and to make sure that they were on point and doing their jobs. The geographic area that the officers were to patrol varied night to night, but usually they have posts at 34 Street, West 4 Street, and tunnel coverage at Broad Street.

In general, officers on patrol are supposed to be a police presence and pick up jobs as they come into their stations. Usually, after the Respondent gives assignments, he takes a meal and does desk relief or patrol duty. The Respondent stated that his tour as patrol supervisor on July 1, 2008 was not unusual. On July 1, 2008, the Respondent left his command at 12:01 a.m. to do an RMP<sup>4</sup> inspection. He then scratched two of the officers. The last scratch was at 2 a.m. and there are no entries in his memo book between that time and 6 a.m., when he went to do bag checks.

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<sup>4</sup> Radio Motor Patrol vehicle.

The Respondent stated that it is not part of his job to walk by every person that he is supervising and that the Patrol Guide does not say that he must scratch everyone. He stated that he cannot be everywhere at once and that he knows that the officers are doing their jobs by using the radio. The Respondent does not recall any of the jobs done by the officers that he did not visit. The Respondent stated that he did not have a reason for not visiting these other officers that he was supervising and that he "messed up."

The Respondent testified that policies have changed since he went to Police Academy and that memo book entries should be made every 20 minutes when working in a Transit Bureau command. This is because the Department wants officers to account for their time, since Transit work is not as busy as work in a precinct. During July 1, 2008 and July 2, 2008, the Respondent never checked to make sure that the officers that he was supervising were making proper memo book entries.

The Respondent has not had any confrontations with officers that he has supervised, or ever inquired about their productivity. He stated that he knows that they perform as they are supposed to perform, based on looking at their monthly activity reports. The Respondent requested to be put on a list to pick up overtime shifts, but once the Surge shift was assigned to him, he could not get out of working it.

The Respondent stated that he covered the desk for the desk officer and that he made appropriate notations in the command log. There were no jobs that came in that required the Respondent to actually respond physically. On July 1, 2008, between midnight and 6 a.m., the Respondent was driving around the command and then went back to the District to relieve the lieutenant at the desk. He made entries in the command

log at the desk at 3:35 a.m. and 6 a.m. There is no reason why the Respondent failed to visit any of the officers that he was supposed to be supervising on July 2, 2008.

On re-direct examination, the Respondent stated that the allegation that he had abused his overtime in any way was unsubstantiated and he was never charged.

Upon further questioning by the Court, the Respondent stated that Transit District 2 is located in lower Manhattan on the A subway line which is on Canal Street and 6 Avenue. He stated that he covers the area west of 6 Avenue from 34 Street down to the Staten Island ferry. The subway lines covered include the A, C, E, 1, 4, 5, 6, F, N, and R, but not the Path system. The Respondent travels around the command in an RMP.

#### PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined, see Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on February 28, 1994. Information from his personnel folder that was considered in making this penalty recommended is contained in the attached confidential memorandum.

The Respondent has pleaded guilty to the specifications in this case. The sole issue is penalty. The Department has recommended a penalty involving the loss of 28 vacation days. The Respondent has asked that a lesser penalty, between 10 and 15 days be imposed.

The charges in this case cover two days, July 1, 2008 and July 2, 2008. The Respondent worked his regular tour plus two hours of overtime on July 1, 2008. He then requested and was granted three additional hours of overtime, after which he was on an

overtime shift to carry out a Surge. This overtime tour was approved by the borough and once assigned, the Respondent could not get out of performing it.

At the end of the Surge overtime tour the Respondent reported for a regular tour on July 2, 2008.

Specification No. 1 charges that the Respondent failed to visit 22 members of the service under his supervision on their assigned posts. This specification appears to be related to the two regular tours because, during the Surge overtime, he was present with the officers working under him and during the three-hour overtime he was engaged in administrative duties. It was stipulated that on the first of the regular tours there were 12 officers under his supervision and during the second regular tour there were 11. There is uncontroverted testimony that the Respondent visited and scratched the memo books of three of his subordinates. Therefore the total listed in the specification is slightly off as the correct cumulative number of subordinates he did not visit was 20.

In mitigation of this specification, the Respondent noted that he did in fact supervise the officers working for him by monitoring the radio to make sure they were responding to calls. He further pointed out that the Patrol Guide does not specifically require that every memo book be scratched every tour. However, he acknowledges his guilt.

Specification No. 2 alleges that he wrongfully failed to maintain his activity log. The Respondent's activity log is in evidence (Court Exhibit 1). There are in fact a number of notations in the Respondent's activity log including a scratch by a captain at 7:33 p.m. on July 1, 2008 during the Surge tour.



The questioning of the Respondent regarding the memo book focused on two specific periods; from 2 a.m. on July 1, 2008, when he scratched one of his subordinates and 6 a.m. that day, when he began a bag check operation, and from 12:01 a.m. on July 2, 2008 to 6 a.m. on that day when he again began a bag check operation.

The Respondent admitted his failure to make more detailed notations during those periods. He indicated that he was engaged in other activities during those time periods, including covering the desk.

This brings us to Specification No. 3 which alleges that he failed to sign in and out of the command log. No specifics were offered as to what this failure entailed, beyond the fact that he did not note that he was assuming the responsibility of serving in the capacity of desk officer and what time he ceased serving as the desk sergeant.

In support of its recommendation for a penalty of 28 vacation days the Department has cited three cases. Disciplinary Case No. 82256/06 signed 10/09/07, Disciplinary Case No. 82812/07 signed 09/10/08 and Disciplinary Case No. 82975/07 signed 08/19/08.

The first thing that should be noted about these cases as precedent is that in all of them the punishment was less than the Department has recommended in this case. In the first of the abovementioned cases the penalty was the loss of 20 days, in the second, the loss of 18 vacation days, and in the last, the loss of 17 vacation days.

It should be noted that this Respondent has a prior disciplinary record and that too should be considered on the issue of punishment. However this factor is at least diminished by the fact that each of the Respondents in the three cited cases had prior disciplinary actions. The Respondents in the first and third of the above cited cases had

two prior disciplinary actions while the Respondent in the second above cited case had one prior disciplinary adjudication.

It is noted by the Respondent that his captain recommended a command discipline with a penalty of ten days. While the captain's opinion is not controlling, it is worth noting that matters of this type are sometimes handled at the command discipline-level. Usually when formal discipline occurs there are serious aggravating factors.

This can be seen in a review of the file in Disciplinary Case No. 82256/06 cited by the Department and noted above. In that case there apparently was significant failure by officers in the VIPER 6 unit to check license plates in the Rim pager. The problems included using the account code of a member of the service who was no longer in VIPER. After that officer's account code expired, officers under the supervision of the Respondent in that case continued to use that expired number in the log leading investigators to conclude that all of the entries for a three week period were false.

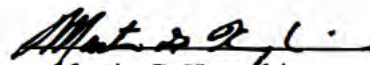
The differences between that case and the matter currently before the Court are significant. The period of time here involves two days and indeed only a portion of the time worked by the Respondent in that two-day period.

There is no allegation that any of the officers under this Respondent's supervision failed to perform their functions or for that matter that the Respondent failed to perform any police function. For instance there is uncontroverted testimony by the Respondent that he logged in an arrest on July 2, 2008 while serving as desk officer.

Certainly a penalty is appropriate, however the Department has not presented a convincing basis for the rather substantial penalty it has proposed. On the other hand, the Respondent has a prior disciplinary action which involved the loss of both suspension

and vacation days as well as the imposition of dismissal probation. Under the theory of progressive discipline, a penalty of ten to fifteen days suggested by counsel for the Respondent is inadequate to the totality of the situation. This Court, therefore, recommends a penalty involving the loss of 20 vacation days, which is also consistent with the cited cases.

Respectfully Submitted,



Martin G. Karopkin  
Deputy Commissioner Trials

**APPROVED**  
JUL 27 2010  
RAYMOND W. KELLY  
POLICE COMMISSIONER



POLICE DEPARTMENT  
CITY OF NEW YORK

From: Deputy Commissioner – Trials

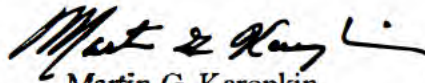
To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM  
SERGEANT MICHAEL FARONE  
TAX REGISTRY NO. 906205  
DISCIPLINARY CASE NO. 84747/08

In 2007 and 2009, the Respondent received an overall rating of 4.0 "Highly Competent" on his annual performance evaluation. In 2008, he was rated 3.5 "Highly Competent/Competent." He has been awarded 60 medals for Excellent Police Duty and four medals for Meritorious Police Duty. [REDACTED]  
[REDACTED]  
[REDACTED]

The Respondent has been the subject of a prior disciplinary adjudication. In 2004, he was found guilty after a Department trial of abusing his authority by arresting without cause, threatening, and using force against an individual. In addition, he pleaded guilty to repeatedly leaving work early, resulting in payment of over 33 hours of overtime and three hours of straight time that he had not earned. For his misconduct, he forfeited 40 vacation days, ten suspension days, and was placed on one year dismissal probation.

For your consideration.

  
Martin G. Karopkin  
Deputy Commissioner Trials